BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANNMARIE G. SALSBERRY (DECEASED) Claimant	)	
v.	)	Docket No. 1,054,969
MERCY HEALTH SYSTEM OF KANSAS Self-Insured Respondent	)	

ORDER

Respondent requested review of the April 15, 2013 Award and Award Nunc Pro Tunc.[1] Claimant died in a motor vehicle accident on December 9, 2010. The surviving minor children, Carrissa A. Peacock and Chris Joseph Peacock, appeared by their attorney, Richard Loffswold, Jr., of Girard, Kansas. The surviving spouse, Terry Salsberry, appeared by his attorney, Kala Spigarelli, of Pittsburg, Kansas. The respondent and insurance carrier appeared by their attorney, Joseph Ebbert, of Kansas City, Missouri.

The Board heard oral argument on July 26, 2013. The Board has considered the record and adopted the stipulations listed in the Award Nunc Pro Tunc, in addition to the transcript of Jack Obert's February 28, 2013 testimony, along with exhibits, which were not listed in the "RECORD" section of the Award Nunc Pro Tunc.

ISSUES

The Award Nunc Pro Tunc indicated claimant's accident arose out of and in the course of her employment. Respondent argues the Award Nunc Pro Tunc should be reversed because the going and coming rule precludes compensability. Claimant argues the going and coming rule does not apply because she had already commenced work when her accident occurred. Claimant requests that the Award Nunc Pro Tunc be affirmed.

The issue is:

> Does the inherent travel exception[2] to the going and coming rule apply, such that claimant's fatal accidental injury arose out of and in the course of her employment?

---

[1] Insofar as the Award Nunc Pro Tunc supercedes the Award, respondent is appealing the Award Nunc Pro Tunc.

[2] The Kansas Court of Appeals concluded no such exception exists and the going and coming rule simply delineates whether an employee has already assumed job duties when traveling to or from work. See *Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 171, 274 P.3d 650 (2012), *rev. denied* 297 Kan. __ (May 20, 2013). However, the Kansas Supreme Court refers to the intrinsic travel rule as an exception. See *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, 899 (2012).

FINDINGS OF FACT

On December 9, 2010, at approximately 9:08 a.m., claimant was driving north on U.S. Highway 69 in a 2003 Buick Century owned by respondent. Claimant died from blunt trauma when the Buick collided with a Kansas Department of Transportation dump truck that was stopped for road repair. The Kansas Highway Patrol report indicated a witness named Kristina Stansbury stated claimant was looking down when the collision occurred.

Claimant's husband, Terry Salsberry, testified claimant checked out the Buick from respondent's Independence hospital on December 7, 2010, and drove it from their residence in Altamont, Kansas, to respondent's Fort Scott hospital on December 8, 2010. Mr. Salsberry's impression was that claimant was traveling directly from their home to Fort Scott on the morning of the accident. Claimant's work calendar indicated she was to be in Fort Scott at 8:00 a.m. on December 9, 2010, and contained no indication that she would have worked anywhere else earlier that day.[3]

When providing a statement to the highway patrol, Mr. Salsberry indicated claimant would "frequently read documents while enroute [*sic*] to her shift" and questioned if she may have been reading or distracted at the time of the accident.[4] The Kansas Highway Patrol report contains no mention of work-related documents being recovered from the accident scene.

Claimant was respondent's Executive Director of Quality Assurance. She ensured compliance with different joint commission regulations, ensuring quality control for respondent, and managing facility risk and safety. She made sure respondent was prepared for joint commission and state surveys. She interacted with staff, set committee agendas, prepared committee reports and ensured performance of committee work.

Claimant had offices at respondent's Independence and Fort Scott hospitals. Claimant was expected to devote 50% of her work to each hospital. She was an "exempt" employee: she earned an annual salary and had flexibility to decide when she started and ended her work day. Her job description stated, "This position is a full-time exempt salaried position. Unlike the non-exempt positions which are related to specific scheduled hours, 'full-time exempt salaried' relates to the requirements of the position which may be equal, exceed, or be less than that of a 'full-time non-exempt' position."[5] There was no written policy stating claimant was not "on the clock" until she arrived at one of the hospitals. She was expected to work 40 hours per week, but required to work as many hours as necessary to accomplish her tasks.

---

[3] Baker Depo., Cl. Ex. 4 at 24.

[4] R.H. Trans., Resp. Ex. A (Kansas Motor Vehicle Accident Report at 7).

[5] Baker Depo., Cl. Ex. 2 at 7 (Bates stamped 141).

Claimant's job description states operating vehicles or machinery was a "frequent task" occurring 34-66% of the time.[6] "Machinery" is not defined in the job description. She had to travel to rural Kansas clinics in Arma, Cherryvale and Pleasanton, once or twice per year, and attend meetings about 12 times a year in St. Louis, Missouri, and at least six times a year in Springfield, Missouri, in addition to attending training seminars in and out of Kansas. She traveled to a specialty clinic and a home health department in Fort Scott, but separate from that hospital, and a fitness and physical therapy facility in Independence, also separate from that hospital. Claimant was not paid mileage for personal trips.

Mr. Salsberry testified claimant constantly worked at home and could remotely access her office computer from their personal home computer. Mr. Salsberry testified that claimant frequently checked her work email at home. He indicated claimant would work from home every night and sometimes on weekends. Mr. Salsberry testified claimant regularly used her own cell phone to conduct business. Respondent provided claimant a stipend to pay for her personal cell phone. Respondent determined whether an employee received a phone stipend, in part based upon the extent of the employee's required travel.[7] On the morning of the accident, claimant did not have her cell phone or any electronic device in her possession, but did have a zip drive used for work. Mr. Salsberry had claimant's cell phone on December 9.

Mr. Salsberry testified claimant used a personal vehicle to go to Independence, but would always check out a hospital vehicle from Independence the day before she was to work in Fort Scott, take it home, and drive it to Fort Scott when ever she worked at such hospital, never using a personal vehicle to go to Fort Scott. He estimated they lived about 45 minutes from Independence and maybe an hour and 15 or 20 minutes from Fort Scott.

Reta Baker, president and CEO of Mercy Hospital in Fort Scott, and Eric Ammons, president and CEO of Mercy Hospital in Independence, were claimant's direct supervisors. They characterized claimant as a "very good" and "fantastic" employee.[8]

Ms. Baker and Mr. Ammons testified, consistent with respondent's "STANDARD OPERATING PROCEDURE," (SOP) that hospital vehicles were intended for business use only. The Independence SOP states, "Taking a Mercy owned vehicle on a business trip should be your first choice."[9] The corporate SOP regarding business travel states, "The use of hospital-owned vehicles is required when one is available."[10]

---

[6] *Id.*, Cl. Ex. 2 at 10 (Bates stamped 144).

[7] Ammons Depo. at 16-17.

[8] Baker Depo. at 21; Ammons Depo. at 19.

[9] Baker Depo., Cl. Ex. 5 at 3.

[10] *Id.*, Cl. Ex. 8.

Respondent's SOP does not define business use of a company vehicle.[11] However, Ms. Baker acknowledged that using a company car to travel to the rural Kansas clinics, St. Louis or Springfield would be for a business purpose and appropriate.

Claimant did not hide the fact that she was regularly using a hospital vehicle. Her job description did not state when it was inappropriate to use a company car and she was not told when it was inappropriate to use a company car. Claimant was never told that driving a hospital vehicle to work was not a business activity.[12] Ms. Baker and Mr. Ammons testified that prior to claimant's death, and for some unknown duration thereafter, they were unaware she had been using a hospital vehicle to travel from her home to Fort Scott.

Ms. Baker characterized claimant's use of company vehicles to travel from home to work as unauthorized. Ms. Baker characterized claimant's December 9, 2010 trip from her home toward Fort Scott as claimant commuting to work. Ms. Baker testified that commuting to work is not a business purpose as it relates to use of respondent's fleet vehicles. No employees at either respondent's Independence or Fort Scott facilities were provided a company-owned vehicle for their personal use.

Nothing in respondent's policy stated cars could not be kept overnight. Ms. Baker never told claimant that she could not drive a company vehicle to Fort Scott. Ms. Baker believed claimant should have known she was not supposed to use a hospital vehicle to drive to Fort Scott because one of claimant's selling points during her interview was that she lived in between the two hospitals so it would be an easy commute for her to go to either Independence or Fort Scott.[13] There was nothing in claimant's job description that indicated claimant could not drive a hospital vehicle to either hospital or that driving from her home to one of the hospitals was not a business activity.

Mr. Ammons testified checking out vehicles was on an "honor system"[14] and claimant could have checked out a vehicle every day if it was being used for business purposes and not for commuting. Mr. Ammons considered claimant's use of company vehicles to commute to be for her personal reasons and an abuse of respondent's policy.

Mr. Ammons was suspicious that claimant had been using a company vehicle because she and her husband were having vehicle problems. Mr. Ammons was suspicious because he learned after claimant's death that hospital personnel were driving Mr. Salsberry to the funeral home.

---

[11] *Id.*, Cl. Ex. 2 at 18 (Bates stamped 720); Cl. Ex. 5 at 2-3; Cl. Ex. 6 at 2.

[12] *Id.* at 75-76.

[13] *Id.* at 34.

[14] Ammons Depo. at 25.

Mr. Salsberry testified that at the time of his wife's death, they owned a Chevy van and a Kia Sedona, both operational, but the Kia had mechanical problems subsequent to his wife's death. The Salsberrys did not like using the van, as it used up a lot of gasoline.

Jason Costin, respondent's facilities director as of December 9, 2010, testified that hospital-owned cars could be checked out for business purposes and the check out process was informal. Documents titled "Mercy Vehicle Checkout" illustrate that spaces regarding who checked out a vehicle and when a car was checked out and returned were often left blank.[15]

Mr. Costin testified that claimant regularly checked out hospital vehicles and sometimes already had the car keys. Claimant reserved a company vehicle nearly every day in September 2010, including for two weekends, most days in October 2010, 14 days in November 2010 and nearly every work day in December 2010, even after her death. Reserving a car did not mean that the car would have been checked out.[16] The "Mercy Vehicle Checkout" sheets show that claimant checked out and returned vehicles from June 9 to June 29, June 29 to July 2, an unknown/blank date until August 20, August 20 to an unknown/blank date, October 27 to November 3, and November 3 until an unknown/blank date. There is no notation in the "Mercy Vehicle Checkout" for claimant checking out a vehicle on December 7, 2010.

Mr. Costin never questioned claimant's use of respondent's cars. Mr. Costin similarly never advised the administration about claimant's use of the vehicles; he felt he had no right to question her based on her administrative position. Mr. Costin testified checking out a vehicle to go home at night would be a violation of hospital policy, but he also testified not knowing if an employee taking a vehicle home overnight would be a violation of respondent's policy.[17]

Jack Obert, respondent's network security architect and auditor, indicated claimant could access her work computer through a remote system, and receive and send emails through a webmail system. Mr. Obert testified claimant's last remote session was from inside the Mercy network on December 2, 2010 at 9:09 a.m., her last email was sent on December 8, 2010 at 5:40 p.m., and the last email received was on December 9, 2010, at 6:06 a.m. As emails are cycled out of the system after 30 days, he has no way of determining claimant's exact physical location when she sent the email on December 8, nor whether she viewed the email received on December 9.

---

[15] Baker Depo., Cl. Ex. 3 at 1-3.

[16] *Id*., Cl. Ex. 4 at 2-5.

[17] Costin Depo. at 15, 22.

The Award Nunc Pro Tunc concluded:

> [T]ravel by car was an intrinsic part of claimant's job based both upon her job description and the facts in the evidentiary record concerning her traveling duties. Her job required her to be mobile and to be able to service a variety of job locations. She had multiple sites where her services were required and the fact that she was on her way to one of the fixed sites in Fort Scott is of no special significance in determining whether travel was an intrinsic part of her job. Claimant was not on the way to assume the duties of her job when she drove because [she] had begun those duties, both the driving itself and performance of other business duties during her trips.
>
> Her location in Altamont, Ks. and the required long commutes to both fixed sites served the interest of her employer because claimant was able to service and work at both sites and as a result claimant faced greater risks than the average commuter. Where employment requires travel from place to place in the discharge of the employee's duties, an injury which occurred while traveling is an exception to the "going and coming rule." *Schmidt v. Jensen Motors, Inc.*, 208 Kan. 182, 490 P.2d 383 (1971); *Kennedy v. Hull & Dillon Packing Co.*, 130 Kan. 191, 285 Pac. 536 (1930).
>
> . . .
>
> [C]laimant's accidental death arose out of and occurred in the course of her employment with the respondent, a finding derived from the cited case law and the facts that: 1) driving was an intrinsic part of her job as indicated by claimant's position description and the testimony provided by other witnesses regarding the numerous places she was required to travel; 2) she had multiple fixed sites where she performed her job, including her home. Thus, her commuting from place to place were work related errands consisting of driving from one site of employment to another; 3) she was performing other duties to the benefit of the employer while driving; 4) claimant was paid by a salary, and not by the hour. She was expected to work any hours necessary to complete her job, and thus she was being compensated for driving from one location to another and was not "off the clock" when her fatal accident occurred. 5) she was driving a car owned by her employer at the time of her fatal accident.[18]

The Award Nunc Pro Tunc also noted respondent never questioned claimant's use of a company vehicle until after her death, there was no policy stating an exempt employee was "off the clock" until arriving at one of the hospitals, and there was no policy prohibiting claimant from keeping a car overnight or forbidding her use of the car to commute.

[18] ALJ Award Nunc Pro Tunc at 6-8.

PRINCIPLES OF LAW

Claimant has the burden of proving that the preponderance of the credible evidence establishes her right to an award.[19] Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case.[20]

The "going and coming" rule contained in K.S.A. 2010 Supp. 44-508(f) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

The Kansas Supreme Court observed in *Thompson*[21]:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[22]

"[A] worker who is traveling to and from work is not generally covered by the Act because mere travel to and from work does not, by definition, arise out of and in the course of employment."[23] The "going and coming" to work rule is not applicable where travel is a necessary and integral part of the employment.[24]

---

[19] K.S.A. 2010 Supp. 44-501(a) & K.S.A. 2010 Supp. 44-508(g).

[20] See *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[21] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994)

[22] *Id.* at 46.

[23] *Scott v. Hughes*, 294 Kan. 403, 414, 275 P.3d 890, 899 (2012).

[24] See *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973); see also *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan.1042 (1984).

"A fixed-situs employee does travel to the job site in order to perform the business of the employer, but the Act excises this activity from the scope of compensation in order to keep the employer's burden manageable. In light of the cases cited above, when determining whether a given daily commute is within the scope of the Act, an increased risk to the employee or an increased utility to the employer is a useful indicator of whether the inherent travel exception should apply."[25]

". . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself."[26]

ANALYSIS

Where travel is integral to a claimant's employment, such claimant's accidental injuries sustained during travel are generally compensable. This rule has been applied to a number of factual scenarios which demonstrate a theme of what is compensable, as noted in the following discussion of precedent.

In *Mitchell,*[27] the claimant, who was a "tool pusher" and president of his company, had to travel extensively between wells. He was on call 24 hours a day and had to respond to emergencies. Mitchell died in a motor vehicle accident while traveling to supervise the commencement of a well. He was using a company car loaded with drilling equipment. The *Mitchell* decision states:

> The accident also arose out of his employment. A necessary part of his employment consisted in traveling from well to well and to any other place at which he might desire to transact business pertaining to drilling activities. Manifestly, part of his business consisted of traveling the highways. The hazards and risks of highway travel were incidents of his employment. It was in connection with those hazards of employment that his death occurred and it cannot be said the accident did not arise out of his employment.[28]

---

[25] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 546, 18 P.3d 278, 282 (2001), *rev. denied* 271 Kan. 1035 (2001); see also *Ostmeyer v. Amedistaff, L.L.C.*, No. 101,909, 220 P.3d 593 (Kansas Court of Appeals unpublished opinion dated Dec. 11, 2009).

[26] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315, 1321 (1997); see also *Kennedy v. Hull & Dillon Packing Co.*, 130 Kan. 191, 285 P. 536, 538 (1930) ("His employment differs from one employed in the factory who might have been injured on his way to the factory where his work was to be performed. In such a case the worker would not be entitled to compensation.").

[27] *Mitchell v. Mitchell Drilling Co.*, 154 Kan. 117, 114 P.2d 841 (1941).

[28] *Id.* at 122.

In *Blair*,[29] mechanics died in a motor vehicle accident while driving home after an examination their employer expected them to take. The trip was incidental to and part of the mechanics' employment. The Kansas Supreme Court stated:

> Having concluded that the trip to Pittsburg to take the examination was a part of the employment, it seems entirely logical to conclude that the entire undertaking is to be considered from a unitary standpoint rather than divisible. To take the examination it was necessary for decedents to make the round trip to Pittsburg. That involved travel by private automobile-going and returning-one project, so to speak, and included the normal traffic hazards inherent in such an undertaking. The act does not require that the injury be sustained on or about the employer's premises.
>
> . . .
>
> In conclusion, we hold that under all of the facts and circumstances of the case, the lower court was correct in ruling that the trip to Pittsburg to take the examination was an integral part of the employment, and that at the time and place in question decedents had not left the duties of such employment within the meaning of G.S.1949, 44-508(k).[30]

A pumper died in a motor vehicle accident while traveling between different sites in *Newman*.[31] Upholding the district court's decision, the Kansas Supreme Court stated:

> [D]ecedent's work was such that he was expected to use a pickup truck as a part of his employment with all of his employers. He was required to haul heavy tools, equipment and supplies in servicing the leases and keeping the wells in operation. Use of the truck was vital in making repairs as promptly as possible. His duties were not confined to particular premises nor was his pay dependent solely on services to be performed "on the premises" of each particular lease. Driving a pickup truck, as distinguished from an ordinary passenger automobile, and having it available for immediate use when needed, was definitely a part of the service for which the decedent was being compensated by each employer. It cannot be said that such travel was of a type purely personal to him–he was required to have certain equipment and supplies with him and available while on duty and also to have a mode of rapid transportation. Clearly travel on the public highway was regarded by all as a part of his work.[32]•

---

[29] *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951).

[30] *Id.* at 529-30.

[31] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[32] *Id.* at 568; see also *Bell v. A. D. Allison Drilling Co., Inc.*, 175 Kan. 441, 264 P.2d 1069 (1953), r'hg denied Jan. 26, 1954 (compensation awarded when oil driller died in a motor vehicle accident while trying to assemble a crew).

Possession of work paraphernalia was noted in *Newman* to be a factor in determining compensability in going and coming cases, but did not convert a trip into being part of employment.[33]

Messenger[34] concerns a fatal motor vehicle accident while the claimant was on his way home from a remote drill site. Messenger had no permanent work site. His employer sought employees that were willing to work at "mobile" drill sites and reimbursed travel at 20¢ per mile. It was industry practice for drillers to live some distance from drill sites and travel daily. The Court found claimant's travel home from the drill site was an intrinsic, integral and necessary part of his work and found the motor vehicle accident compensable as an exception to the "going and coming" rule. The Court described the exception as follows:

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[35]

In *Estate of Soupene v. Lignitz*,[36] the Kansas Supreme Court ruled that responding to emergencies by going to either the fire station or the site of the emergency was a necessary and integral duty of volunteer firefighters.

In *Sumner,*[37] the claimant, a truck driver who lived in Council Grove, would take his employer's truck home every evening and would be dispatched out of his home each morning. He picked up a load in Sugar Creek, Missouri, and made a delivery to Emporia. He returned to Sugar Creek and his truck was loaded for a delivery to Junction City. However, claimant called respondent's dispatcher and indicated he needed to return home to handle an emergency. Respondent allowed claimant to take the truck home. While on his way home, Sumner was killed in a motor vehicle accident. The parties stipulated that Sumner's trip to Council Grove was purely personal. Substantial competent evidence supported the Board's denial of benefits. Claimant substantially deviated from his work and was on a personal errand at the time of his death.

---

[33] 212 Kan. at 569.

[34] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

[35] *Id.* at 437.

[36] 265 Kan. 217, 960 P.2d 205 (1998).

[37] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 144 P.3d 668 (2006).

In *Halford*,[38] a water and sewer foreman drove a specially equipped truck that could refuel heavy equipment. He was driving to pick up a worker, Benson, before intending to go to the respondent's "yard" to pick up supplies. Halford died in an accident while en route to Benson's home. While Halford was not paid for his travel, he had to travel great distances from his home to various job sites. The Court concluded "use of a company vehicle, specially equipped for the work to be performed, is an appropriate factor to be considered in determining whether travel in that vehicle is an intrinsic part of the employment . . . ."[39] The Court noted that Halford was a supervisor and had transportation in a company vehicle. The Court observed that Halford did not deviate from his employment or engage in a personal side-trip. Further, the Court concluded that travel was an intrinsic part of Halford's work because he was on a special work-related errand to respondent's "yard" at the time of the accident.

A negligence case, *Scott*,[40] demonstrates that workers who are in the course and scope of their employment are shielded from personal liability by the fellow servant rule, K.S.A. 44-501(b). Hughes, a driller and crew chief, lived in the Great Bend area, as did his crew. He was paid mileage expenses. The crew members were paid $15 "ride time" for sites more than 100 miles away. Hourly pay began at the job site. The workers would change job sites every 12 to 16 days.

The *Scott* case looked at consistent patterns from prior going and coming cases:

> Payment of mileage was critical to the outcome in *Messenger*, for example, and so was the absence of a permanent work site and the practical necessity of daily travel from home to perform job duties. The benefit of the worker's travel to the employer was mentioned explicitly in *Messenger* and repeatedly alluded to in *Mitchell*. In *Bell*, the travel inherent in the responsibility for assembly of a crew for a drilling site was persuasive. Our *Newman* case relied on the nature of the vehicle–a pickup truck loaded with tools, equipment, and supplies–as well as recognition that the pumper's duties were not confined to a single work site. In contrast, in *LaRue*, the subject derrick man was on a "'personal mission having no connection with his employment'" at the time he suffered his fatal injury. 183 Kan. at 157, 325 P.2d 59. He was not "'moving to another location at the request of his employer, but rather was going home after leaving the duties of his employment.'" 183 Kan. at 157, 325 P.2d 59. In other words, the travel in which the derrick man was engaged at the time of the accident offered no benefit to his employer.
>
> . . .

---

[38] *Halford v. Nowak Constr. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 297 Kan. 765 (2008).

[39] *Id.* at 940.

[40] *Scott v. Hughes*, 294 Kan. 403, 275 P.3d 890 (2012).

> However Hughes may have characterized the "carpool" in his deposition, at the time of the accident, he had gathered the crew he was responsible for having assembled and ready to work 90 miles from home by 6:45 a.m. He was getting paid for his mileage, Duke Drilling's explicit recognition that his driving was of benefit to its enterprise. Hughes' work site was changeable, and Hughes' ability to adapt and appear with his crew as ordered was part of what Duke Drilling was paying his wages for. Hughes was not on a personal mission at the time of the accident. Indeed, according to all of the witnesses, he was performing an informal but customary duty in his and Duke Drilling's industry.
>
> . . .
>
> The evidence in this case could only show that the travel . . . was an intrinsic part of Hughes' job. The going and coming rule under K.S.A. 44-508(f) thus did not apply, and Hughes was within the course and scope of his employment.[41]

In *Craig,*[42] a driller who typically traveled to different job sites was injured driving home in his own vehicle after temporarily working in a shop. The going and coming rule did not apply because: (1) respondent continued to reimburse Craig for his travel despite the change in work site; (2) there was no permanent work site; (3) Craig still continued to transport at least one member of his crew to and from the shop; and (4) despite the temporary change in location, it still appeared that respondent and Craig received a mutual benefit from the continued transportation arrangement.

In another case involving oil field workers, *Quintana*,[43] employees were injured in a car accident while traveling home from a drilling site. The going and coming rule did not apply because the employees were working from the time they got into the vehicle to travel great distances to mobile drilling sites until the time they returned home.

There are also cases where compensation is denied under the going and coming rule, such as *LaRue*[44] and very recently, *Williams*.[45]

---

[41] *Id.* at 420-22.

[42] *Craig v. Val Energy, Inc.*, 47 Kan. App. 2d 164, 171, 274 P.3d 650 (2012), *rev. denied* 297 Kan. __ (May 20, 2013).

[43] *Quintana v. H. D. Drilling, LLC*, Nos. 106,126, 106,127 & 106,131, 276 P.3d 837 (Kansas Court of Appeals unpublished decision dated May 11, 2012).

[44] *LaRue v. Sierra Petroleum Co.*, 183 Kan. 153, 325 P.2d 59 (1958).

[45] *Williams v. Petromark Drilling*, LLC, 108,125, 2013 WL 2450535 (Kansas Court of Appeals decision dated June 7, 2013), *pet. for review filed* July 8, 2013.

In *LaRue,* after drilling a well, LaRue and a driller decided to leave where they had been staying for work and go to their homes over 100 miles away. The driller's automobile crashed into a tree and LaRue died. LaRue was not furnished transportation as part of his employment. The driller was not authorized to provide transportation for LaRue, but he had a personal agreement with LaRue to share rides. LaRue was not working or under the employer's control at the time of the accident. The Court noted there was substantial evidence to support the trial court's denial of benefits based on the trip home being a "purely . . . personal mission."[46]

A similar result was reached in *Williams*, in which the Kansas Court of Appeals observed Williams was not furthering his employer's interests at the time of his accidental injury. Like LaRue, Williams was on a personal mission to get home from work when his accident occurred. The going and coming rule barred compensability.[47]

Condensing these principles, the Board must consider, in no particular order of importance, various non-exhaustive factors. The key is determining if claimant was already working at the time of her accident. Some of the factors include:

- whether claimant has a permanent/fixed work location or is required to travel to mobile and changing work sites;
- whether claimant is paid, reimbursed or otherwise compensated to travel;
- whether claimant's travel is part of a special errand for respondent;
- whether claimant is on call or responding to an emergency when traveling;
- whether claimant is using a company vehicle, or a vehicle that is either specially equipped for work or transporting work implements;
- whether claimant is transporting work paraphernalia;
- whether claimant's travel is personal or deviates from a work purpose; and
- whether claimant's travel is otherwise necessary and integral to claimant's work or furthers respondent's interest versus merely commuting to and from work;

---

[46] *LaRue,* 183 Kan. at 157.

[47] *Williams*, supra at *6. Kansas Supreme Court rule 8.03(i) states the timely filing of a petition for review stays the Court of Appeals' ruling. Pending the Supreme Court's determination on the petition for review, or the Supreme Court ruling on the case based on the merits, *Williams* is not binding and, while cited, does not impact the Board's ruling.

The facts in this case are materially different from the facts in *Messenger*, *Scott* and *Craig*; such workers had mobile work locations. Here, claimant would perform some work-related travel to rural Kansas clinics and to Missouri, but unlike the workers in *Messenger*, *Scott* and *Craig*, she had two *permanent* work sites. Cases such as *Messenger*, *Scott*, *Craig*, *Brobst*, *Kennedy* and *Butera* generally indicate that injuries occurring while a worker is traveling to a fixed location are not compensable. Claimant was on her way to assume work duties at one of her two permanent work sites when her accident occurred.

Unlike the workers in *Messenger*, *Scott* and *Craig*, claimant was not paid for her mileage. An employer's pay for travel, suggests the travel was, at least in part, work performed for the employer.

Claimant was not on a work-related errand, as was the claimant in *Halford*. While she had no absolutely set hours, claimant was not continuously on call, as was the claimant in *Mitchell*. The Board is unaware of Kansas law or legal precedent establishing that an exempt or salaried employee is continuously "on the clock."

Claimant was driving a company vehicle. Under *Halford*, this is a factor in determining applicability of the going and coming rule. The fact that she openly used a company car to commute to Fort Scott does not mean she was already working as soon as she got in the car to go to work. The fact that respondent indicated that use of respondent's vehicles was limited to business use does not mean claimant's use of respondent's vehicles was always and without question used for business purposes or made her work injury compensable. There is insufficient proof respondent knowingly supplied claimant a vehicle for commuting purposes or acquiesced that her use of a company vehicle for commuting from home to Fort Scott was part of her job duties. There is insufficient proof that respondent was aware or believed claimant was using respondent's vehicles improperly until after her death. There is no evidence regarding whether claimant knew or did not know that she was improperly using a company vehicle. In any event, whether claimant believed she was allowed to use a company vehicle to travel from home to Fort Scott and whether respondent's witnesses opined she violated respondent's policy regarding use of company cars does not directly address whether she was going to work when injured.

Claimant was not driving a specially-equipped vehicle, such as a truck loaded with special equipment, tools and supplies used in performing work at remote locations.

Claimant had a zip drive in her possession. Such factor does not preempt the fact that she was traveling to work. While claimant's husband testified she would sometimes read work documents while driving, the Kansas Highway Patrol report made no mention of work documents being recovered from the accident scene.

Claimant was required to travel to rural Kansas clinics, and to St. Louis and Springfield, Missouri, about 24 times per year in total. Claimant's willingness to make such trips furthered respondent's interests. However, such trips differed from claimant's regular work, which required her to commute to and from her home to the Independence and Fort Scott hospitals. Travel is needed for occupations where a worker commutes from his or her home to a fixed work location. The fact that a worker must travel to and from work does not make travel intrinsic to every job where a worker commutes. To read the statute otherwise would nullify the going and coming rule by allowing the exception to swallow the rule. Claimant's long commutes to fixed work sites exposed her to the danger of motor vehicle travel, but to no more extent than the general public traveling the same roads. The Board views claimant's commuting to and from one of her two fixed work locations as a personal endeavor. The Board is unaware of precedent establishing the compensability of an accidental injury occurring during a long commute to a fixed work site.

There is insufficient evidence claimant was already working while driving to a fixed place of employment on December 9, 2010. There is insufficient evidence that she was reading work documents while driving on December 9, 2010. There is no evidence she was conducting business over the phone while driving on December 9, 2010, as she was not in possession of a phone at that time. Claimant was simply going to one of her two fixed offices on the date of accident, not traveling to a rural Kansas clinic, St. Louis or Springfield, Missouri. There is insufficient proof that claimant had already assumed work duties when her accident occurred.

Unfortunately for claimant's surviving spouse and minor children, the factual differences in this case and cases where the going and coming rule was held not to apply are substantial and determinative. The claimant was going to work, but had yet to assume her duties. Pursuant to K.S.A. 2010 Supp. 44-508(f), claimant's accidental injury did not arise out of and in the course of her employment.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein and considered the parties' arguments, the Board reverses the Award Nunc Pro Tunc.

AWARD

WHEREFORE, the Board reverses the April 15, 2013 Award Nunc Pro Tunc.

IT IS SO ORDERED.

Dated this _____ day of August, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Richard Loffswold, Jr.
rdl@ckt.net

Kala Spigarelli
kspig@spigarelli-law.com
lori@spigarelli-law.com

Joseph Ebbert
jebbert@fwpclaw.com
esmiley@fwpclaw.com

Honorable Brad E. Avery